IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1690

HAROLD OMAN SPENCE

Appellant

v.

STATE OF WASHINGTON

Appellee

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF THE RESPONDENT

Christopher T. Bayley
King County Prosecuting Attorney
JAMES E. WARME
Attorneys for Respondent

W554 King County Courthouse
Seattle, Washington 98104
Telephone: 344-2550

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SUMMARY OF THE ARGUMENT

Symbolic speech like pure speech is protected by the First Amendment. *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969). However neither free speech nor symbolic speech is an absolute right. *United States v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). Both may be curtailed by governmental regulation without affecting constitutional guarantees if (1) the regulation furthers an important governmental interest, (2) the gov-

ernmental interest is unrelated to the suppression to free expression, and (3) the incidental restrictions on alleged First Amendment freedoms are no greater than is essential to the furtherance of that interest. *United States v. O'Brien, supra* at 377. Under this standard Washington State statute RCW 9.86.020 is constitutional.

ARGUMENT

I.

ARGUMENT IN RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR NO. I.

The freedom to express ideas, even unpopular ones, is an important cornerstone of our democracy. The right to unfettered expression embodied in the First Amendment encompasses symbolic speech as well as the spoken word. *Tinker v. Des Moines, supra.* Respondent acknowledges that laws which would encroach upon these fundamental rights must be regarded with suspicion. Laws which seek to control ideas and attitudes are a greater threat to personal liberties than foreign enemies.

On April 30, 1970, the United States after years of warfare in Viet Nam sent American troops into the sovereign territory of Cambodia. Emotions ran high in America; the Viet Nam war was still a topic of sincere and often bitter debate. In American Universities, traditionally a citadel of free debate, feelings were extremely high. On May 4, 1970, students at Kent State University in Ohio joined other students across the country in exercising their constitutional rights to assemble and to petition for a redress of grievances. Unfortunately at Kent State, the high level of feelings led to a tragedy.

National Guard troops called onto the campus to maintain order fired upon the students killing four of them.

Harold Oman Spence, a full-blooded American Indian and a student at Seattle Community College was one of many millions of Americans who felt compelled to express himself about the war in Viet Nam and the killings at Kent State. He took his own American flag and attached to it a peace symbol made of black electrical tape. He then placed this flag upon a staff and displayed it to public view in the central area of Seattle. A bystander saw this flag and became upset. He called the police who arrested Mr. Spence for violation of RCW 9.86.020.

On the witness stand Mr. Spence told the jury that he did not know that it was unlawful to publicly display an altered American flag. Further he said:

> I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought that America stood for peace.

Respondent, the State of Washington, can think of no ideal more worthy of protection than Mr. Spence's belief that "America stands for peace." But the equities of this particular fact pattern must be set aside to fairly evaluate the question before this court.

Acknowledging that symbolic speech falls within the protection of the First Amendment, the question then becomes: "Can a state, in exercising its responsibility to maintain public peace and to promote the general welfare, prohibit certain forms

of conduct having First Amendment overtones, when such prohibition is not intended to promote or restrict any particular idea, philosophy or expression?"

The answer to the question, as phrased, is yes. Freedom of speech is not a license. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942). In *Chaplinsky* this court said:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech that prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite in immediate breach of the peace.

571-572.

This same limitation on the spoken word applies equally to symbolic speech. In *United States v. O'Brien, supra,* at 377, this court observed:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea. However even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring it into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. The court has held that when speech and nonspeech elements are combined in the same course of conduct a sufficiently important governmental in-

terest in regulating the nonspeech element can justify incidental limitations on the First Amendment freedoms.

The state of Washington submits that the constitutionality of RCW 9.86.020 must be affirmed under the test enunciated in *O'Brien, supra.*

RCW 9.86.020 provides:

> No person shall in any manner, for exhibition or display:
>
> . . .
>
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; . . . .

Under this statute, to prove a violation, the state must establish three elements: (1) An actual American flag must be involved; (2) The flag must have been altered by attaching any figure, mark, picture, design, drawing or advertisement; and, (3) the altered flag must then be displayed to public view. In essence the statute forbids the public display of an altered American flag.

As such the statute clearly meets the *O'Brien* standard. Respondent has at all times and in all courts urged that the only and sole legitimate state interest protected by RCW 9.86.020 is the public peace. The preservation of order is clearly related to an important and substantial governmental function—and this interest is acknowledged by the appellant. The appellant, however, would minimize the attention which the respondent has given to this interest as follows: "The legitimate state interest

is, of course, the preservation of the peace." (App. Brief, p. 11.)

Respondent concedes that the Washington State Supreme Court decision at 81 Wn.2d 788 (1972) did not turn on the issue of the preservation of peace. Rather the Supreme Court of the State of Washington found a legitimate state interest in "preserving the flag as a symbol of the nation and in keeping it free from extraneous adornment" at 799. Respondent did not advocate this basis for sustaining the statute. Respondent will not now abandon the position announced by the Washington State Supreme Court but it will not actively argue it either. Instead, the state interest which respondent urges this court to consider is the state interest in protecting the peace.

As this court has clearly recognized certain words are fighting words, *Chaplinsky v. New Hampshire, supra,* it does not stretch the imagination to suggest that certain symbols are fighting symbols. Many of the most powerful human experiences have symbols around which people gather. The icons of Eastern Orthodox christianity, the consecrated hosts of Catholicism and the sacred torah of Judaism are all symbols to which people attach strong feelings. There would no doubt be strong and probably violent reactions by people with strong religious identifications should someone decide that these religious symbols would make an effective vehicle for the symbolical expression of one's opposition to a belief in God. Parading a host covered with excrements or the torah dripping with pig's blood before a public audience may be an effective means of communication but it surely would also be a fighting symbol. A statute which forbade the public display

of these high intensity religious symbols so as to preserve the public peace, and which did not seek to control one's religious beliefs, would satisfy the constitutional safeguards of *O'Brien*.

Additionally, should Congress decide that the proscription of any public display of an altered flag of a foreign nation within sight of a foreign border or ministry would reduce provocations which might cause international incidents—then such a law would satisfy the requirements of *O'Brien*.

All the courts which have ever dealt with flag display statutes have acknowledged the high level of feelings held by many people about their own flag. "Hence, the flag is both an appeal for loyalty to existing America, its policies and its ideals, and an invitation for peaceful change to bring America closer to hearts desire. In short, the American flag is an identifying, history preserving and ideological symbol." *State v. Spence,* 55 Wn. App. 752 (1971).

Recognizing the highly symbolic purpose of the flag this court has also recognized the fighting nature of insults to the flag. "Insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." *Halter v. Nebraska,* 205 U.S. 34 at 41, 51 L. Ed. 696, 27 S. Ct. 434 (1907). That additions and alterations to the American flag have been recognized as fighting symbols is recognized in *People v. Radich,* 308 N.Y.S.2d 846 (1970) affirmed by an evenly divided court without opinion 39 U.S.L.W. 4338 (March 24, 1971). In *Radich* the Court of Appeals of New York, relying upon *Halter* and *O'Brien* noted that there was a sufficient governmental interest being protected by the statute—the public peace. The court

held that a New York statute similar to RCW 9.68.020 expressed "a clear legislative purpose to prevent the breach of the peace." 308 N.Y.S.2d 849 (1970).

While many events of near history, such as the rise of Naziism in Germany, may have tempered unbridled nationalistic feelings, nevertheless, millions of Americans still have a strong attachment to their flag. In recognition of the existence of this strong emotion among many citizens of the State of Washington, and not in an attempt to limit the freedom of expression or enforce feelings of respect for the flag, the legislature forbad the public display of an altered flag. The legislative judgment that the flag is not a proper vehicle for conveying any idea, be it peace, brotherhood, world unity, gay liberation, equality of sexes, racial integration, racial segregation, Christianity, Naziism, Communism, Pan-Arabism, love or hate is only a recognition that such conduct may be as much a fighting symbol as Chaplinsky's words.

Of course, it is not enough that the statute merely reflect a legitimate state interest. It must also be an interest which is unrelated to the suppression of free expression. RCW 9.68.020 is narrowly drawn and is unrelated to the suppression of any free expression. The statute is not intended to promote or punish ideas or attitudes about the flag. The statute without exception proscribes all displays of altered American flags. The statute creates no favored exceptions like those the court found unacceptable in *Police Department v. Mosley,* 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972) or *Grainad v. The City of Rockford,* 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). Had the Washington

legislature excepted flag display by major political parties or for expressing certain ideas, then the statute would not be constitutional. But the prohibition is nondiscriminatory and thus within the ruling of *O'Brien*.

Finally to meet the *O'Brien* test, the statute must only incidentally restrict one's freedom of expression. RCW 9.68.020 does not in any way restrict what a person may say or think about the American flag or American public policy. Spence was not convicted for criticizing government actions in Cambodia and at Kent State. His protest could have taken innumerable other forms which would not have threatened the preservation of the peace. Thus any restriction on the freedom of speech resulting from RCW 9.68.020 is limited and incidental as the statute does not prohibit any type of thought.

The Washington State Supreme Court recognized that any restriction is most incidental:

> The issue in this case then is not whether the legislature in enacting 9.86.020 has intended to or actually curtailed or impaired the rights of this defendant to speak freely or to communicate his ideas to others, for there is nothing about the statute which would do this. As applied to him, the statute does not bar the defendant from buying, printing, marking, proclaiming, pronouncing, carrying, advocating, or displaying any kind of material or object he chooses what ever idea he wishes to communicate to others except upon a flag of the United States. Nor does the state contend that he can be required to pay public obeisance to the flag or compel him to pledge allegiance to it. . . .The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States—and perhaps other official symbols, which are not be-

fore us—as a medium of communication. *State v. Spence, supra,* at 798.

Respondent therefore submits that the legitimate state interest required by *O'Brien* is present and that that interest is in preserving the public peace; that this interest has been acknowledged in *People v. Radich, supra, Halter v. Nebraska, and Chaplinsky v. New Hampshire, supra;* that the statutory restriction is unrelated to an expression of free speech; and, that the statutory restriction is nothing more than an incidental restriction on First Amendment freedoms.

II.

ARGUMENT IN RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR NO. II.

Appellant asserts that RCW 9.86.020 is unconstitutional because (a) constitutional activity may be swept within its ambit, (b) because it fails to provide officials with adequate standards of enforcement and (c) because, as construed by the Washington Supreme Court, it is vague and imprecise.

The appellant, for the sake of argument, assumes in assignment of error No. II that Washington may constitutionally impose some degree of regulation upon the use and display of the American flag. Granting this assumption, the appellant then asserts that the statute is otherwise defective because the statute sweeps within its ambit constitutionally protected activities.

This argument was rebutted earlier where it was demonstrated that the statute falls within the *O'Brien* requirement that curtailments of symbolic speech be limited.

As authoritatively construed by the Washington Supreme Court, RCW 9.86.020 is extremely limited.

> The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States—and perhaps other official symbols which are not before us—as a medium of communication.

81 Wn.2d 788 at 798.

The law of Washington concerning statutory construction is the same as the federal rule set forth in *Griffin v. Brekenridge,* 403 U.S. 88, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971). The rule in Washington is:

> An act of the legislature is not unconstitutional in its entirety because one or more of its provisions is unconstitutional unless the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes.

State v. Anderson, 81 Wn.2d 234, 236 (1972).

The appellant relies heavily upon *Long Island Moratorium Committee v. Cahn,* 437 F.2d 344 (2nd Cir. 1970). But *Long Island* does not apply to an actual American flag. It applies to a peace emblem. This is a distinction which was important to both the three-judge federal court and the court of appeals.

The three-judge federal court found that the statute in question in that case applied only to the *actual* American flag (emphasis added) and not to the emblem of the appellant. The three-judge court found that the statute *was constitutional as applied to the American flag itself,* and did not apply to the

appellant's emblem. (Emphasis added.) The court of appeals found that the statute in question there did apply to appellant's emblem and was unconstitutional as applied *to the emblem* (emphasis added).

But the Washington court has already noted that the portion of the statute dealing with the actual flag is a severable portion of the statute. As pointed out above, although the contrary was urged by the appellant in that court, the Washington court noted that those portions of the statute, dealing with symbols other than the actual American flag, "are not before us" 81 Wn.2d at 799. There could be no clearer statement that the judgment of the court there was that the various portions of the statute are severable.

Therefore, since the Washington court has interpreted the statutory provisions to be severable, the appellant may not attack other parts of the statute under which he is not charged. Thus, if it is assumed that the statute is constitutional as applied to the actual flag, this assignment of error must fall since the statute, as authoritatively construed by the Washington court applies only to actual American flags.

The appellant also asserts that the statute fails to afford adequate standards for enforcement. As construed by the Washington court, there is no room for discretion in law enforcement agencies. The prohibition of RCW 9.86.020 is absolute and non-discriminatory.

> The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States . . . .

81 Wn.2d at 798.

The appellant would urge this court, however, to

believe that the statute is arbitrarily administered in the state of Washington. The appellant asserts the widespread use of altered American flags in Washington. There is, however, no showing made at all which would substantiate the appellant's position. As far as the respondent is aware, and certainly as far as a showing in the record, there is no abuse of this statute in the state of Washington. The statute is precise and nondiscriminatory and any defects which may exist, exist only with enforcement agencies and do not inhere in the statute.

Thirdly, the appellant asserts that the statute fails to afford notice of the scope of its proscription. The statute, of course, is precise. It clearly delineates what is proscribed conduct. What is clearly proscribed is the public display of an altered American flag. This was clearly held by the Washington court.

> Defendant contends that the statute is unconstitutionally overbroad and vague, made so by RCW 9.86.010, which relates to such things as standards, colors, ensigns or shields. Although defendant might profess doubts as to what these latter devices are, there is no doubt but that the statute adequately informed him with reference to the article he used—an actual American flag. The prohibited conduct whereof defendant was charged, we think, was described in the statute and in the complaint in language sufficiently clear and concise as to be comprehended by a person of ordinary understanding.
>
> > [A]lmost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel.
>
> Harlan, Justice, concurring in the result in *Cole v. Richardson*, 397 U.S. 238, 240, 25 L. Ed. 2d 275, 90 S. Ct. 1099 (1970); *Cole v. Richardson*, 405 U.S. 676, 683, 31 L. Ed. 2d 593, 92 S. Ct.

> 1332 (1972). Defendant made no claim whatever that he did not know that the article he suspended from his apartment window was a flag of the United States. Thus, as applied to him, the charge was well laid and the statute constitutionally precise. The conduct whereof he was convicted was clearly prohibited and specifically charged.

81 W.D.2d at 793, 794.

However, the appellant's brief does not put forth the traditional argument that the statute is unconstitutional because of vagueness. Instead, the appellant urges that the statute is unconstitutional because it does not require a showing of *mens rea*.

This is a novel approach to the question of vagueness and the respondent is not sure of the logic involved. However, it should be noted that this position is precisely the reverse of the position which the appellant urged below. There the appellant urged that the trial court had erred in failing to instruct the jury that RCW 9.86.020 required proof of a *mens rea*. Now the appellant urges that the statute is unconstitutional because it does not contain an element of *mens rea*.

According to the appellant: "This means that the statute gratuitously punishes conduct which reflects no disrespect for the flag." This assertion by the appellant prompts a number of observations. First, the statute is not designed to gratuitously punish anyone; it merely proscribes certain types of conduct. Had the statutory purpose been to punish conduct or attitudes rather than to control and promote the public peace then Mr. Spence would probably have received a substantial jail sentence rather than the $75 fine which was imposed.

Secondly the position appellant argues is uncon-

stitutional. Appellant contends that the state statute would be proper if it were so drawn as to prohibit disrespect for the flag. But such a statute, *i.e.*, that it is a crime to show disrespect for the flag would violate the constitutional mandate of *Street v. New York*, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) In *Street* this court indicated that a state interest in assuring that people show proper respect for the national emblem is not a sufficient state interest to justify curtailment of free speech. Any statute which attempts to control attitudes or ideas about the flag is unconstitutional. RCW 9.86.020 is constitutional precisely because it does not attempt to require proper respect for our national emblem.

Relying upon this court's historical policy that it will not consider questions raised for the first time on appeal *Duignan v. United States*, 274 U.S. 195, 71 L. Ed. 996, 47 S. Ct. 566 (1926); *Young v. Masci*, 289 U.S. 253, 77 L. Ed. 1158, 53 S. Ct. 599 (1932) the appellee will demur to the alleged error urged by the appellant with the observation that it is the responsibility of the legislature to determine the elements of a crime and it is the responsibility of the courts to pass upon the draftsmanship of the legislature. In terms of protecting freedom of speech, narrowly drawn statutes which are *mala prohibita* provide greater protection for that freedom than do statutes which attempt to control speaker's intent.

Finally, the appellant urges that the Washington court erred in finding that the defendant did not have standing to attack those parts of RCW 9.86.020 which he was not charged with.

The general rule concerning standing is set out in

United States v. Raines, 362 U.S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960) wherein the Supreme Court said

> In the exercise of that jurisdiction it is bound by two rules to which it has rigidly adhered, one, never to anticipate the question of constitutional law in advance of the necessity of deciding it; and the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

362 U.S. at 21. To this rule the court has formulated an exception in areas of the First Amendment. The exception is stated in *Thornhill v. Alabama,* 310 U.S. 88, 84 L. Ed. 1093, 60 S. Ct. 736 (1940). The exception to the rule is that one charged with a violation of a statute may attack the statute without regard to his own conduct.

> Proof of an abuse of power in a particular case has never been deemed a requisite for an attack on the constitutionality of a statute purporting to license a dissemination of ideas.

310 U.S. at 97. The rule and the exception were affirmed in *Dombrowski v. Tfister,* 380 U.S. 479, 14 L. Ed 2d 22, 85 S. Ct. 1116 (1965).

> For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.

380 U.S. at 486.

However, it is also clear that while a person may attack an overbroad statute which is applied to his own conduct, he may not attack a different part of a statute under which he is not being prosecuted.

And, as pointed out above, the Washington court

has held that that portion of the statute which charges the defendant with misusing an actual flag is severable. Consequently, even assuming that RCW 9.86.020 may have unconstitutional sections, nevertheless, following the rule laid out in *Griffin, supra,* the appellant does not have standing to attack other severable portions of the statute.

CONCLUSION

RCW 9.86.020 is a narrowly and precisely drawn statute which limits conduct only in preserving the public peace. It is not overbroad nor vague. It is constitutional.

Respectfully submitted,

CHRISTOPHER T. BAYLEY
King County Prosecuting Attorney
JAMES E. WARME
Deputy Prosecuting Attorney
Attorneys for Respondent

W554 King County Courthouse
Seattle, Washington 98104
Telephone: 344-2550